No. 05-1101

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY W. OMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The United States files this supplemental brief in order to address the implications of the Court's decision in *United States* v. *Resendiz-Ponce*, No. 05-998 (Jan. 9, 2007), on the petition for a writ of certiorari in this case. The petition asked the Court to hold this case pending resolution of the original question presented in *Resendiz-Ponce*: *i.e.*, whether, in a federal prosecution, the omission of an element of the offense from the indictment can constitute harmless error. After supplemental briefing in *Resendiz-Ponce*, however, the Court did not reach that question, but instead held that the Ninth Circuit erred by holding that the indictment in that case was constitutionally deficient at all. The respondent in *Resendiz-Ponce* had been charged with attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a); under that statute, a defendant must commit an overt act that qualifies as a

substantial step toward completion of his goal. Slip op. 5. The Court agreed with the government that the indictment "implicitly alleged that respondent engaged in the necessary overt act simply by alleging that he 'attempted to enter the United States.'" *Ibid.* (internal quotation marks omitted).

In this case, the Ninth Circuit noted that "[respondent's] indictment fails to recite an essential element of the charged offense—materiality of falsehood," and then held that, because respondent's indictment omitted an element of the offense and because respondent properly challenged the sufficiency of the indictment before trial, the indictment should have been dismissed (and respondent was therefore entitled to automatic reversal). Pet. App. 2a. In the wake of the Court's decision in *Resendiz-Ponce*, however, it appears that the indictment in this case was not constitutionally deficient. As the Court has noted, it is well settled that the term "fraud" requires a misrepresentation or concealment of material fact, see, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 22 (1999)—just as the term "attempt," "as used in the law for centuries," encompasses an overt-act requirement, see *Resendiz-Ponce*, slip op. 5. The indictment in this case therefore need not have separately alleged that the scheme at issue (or any statement made in the course of the scheme) was materially false or deceptive.

As in *Resendiz-Ponce*, if the indictment in this case was not constitutionally deficient, the case would not present any question concerning whether a constitutional defect in the indictment could be harmless. Rather than granting plenary review in this case, therefore, the Court should vacate and remand in order to allow the court of appeals to decide, in the first instance,

whether the indictment was constitutionally deficient.* In the event that the court of appeals were to adhere to its holding that the indictment was constitutionally deficient, the government could file, and the Court could consider, a renewed petition for certiorari at that juncture.

* * * * *

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *United States* v. *Resendiz-Ponce*, No. 05-998 (Jan. 9, 2007).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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* Petitioner also argued below that the indictment was deficient because it failed to allege that the defrauded banks were federally insured. The district court held, however, that the indictment implicitly alleged that element through its use of the phrase "financial institution," C.A. Supp. E.R., Tab C, at 5, and the court of appeals did not address that issue.